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BY HAND DELIVERY

Jeff S. Jordan, Esq.
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: MUR 7124

Dear Mr. Jordan:

On behalf of Majority Forward, we submit this letter in response to the Complaint filed by the Foundation for Accountability and Civic Trust ("Complainant") on August 15, 2016 ("the Complaint").

The Complaint falsely alleges that a communication paid for by Majority Forward was coordinated with Katie McGinty for Senate ("the Campaign") and republished Campaign materials, resulting in a prohibited in-kind contribution to the Campaign. The only factual basis for the Complaint's allegations are the alleged similarities in theme between Majority Forward's advertisement and reported communications made by the Campaign on the Campaign's publicly available website *after* Majority Forward's advertisement was already on air. The Commission has made clear on several occasions that such activity does not provide a basis to find that a communication is "coordinated." Because the Complaint does not allege any other facts showing that coordination took place, and because no coordination did take place, the Complaint fails to state any facts that, if true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Commission should therefore dismiss the Complaint and close the file.

FACTUAL BACKGROUND

Majority Forward is a nonprofit corporation organized under Section 501(c)(4) of the Internal Revenue Code. On June 24, 2016, Majority Forward began airing an advertisement ("the Advertisement") critical of U.S. Senator Pat Toomey, Katie McGinty's Republican opponent in the 2016 general election for U.S. Senate in Pennsylvania. The script for the Advertisement, entitled "Love Affair," reads as follows:

> It's a love affair. Pat Toomey and Wall Street. Wall Street's given Toomey $2.7 million dollars in contributions. And Toomey supported privatizing Social Security in the stock market. Wall Street would profit with hundreds of billions in fees, even if the market crashed and people lost everything. Pat Toomey. Wall Street. It may be love for them, but it's heartache for the rest of us.

The Complaint falsely alleges that the Advertisement was coordinated with Ms. McGinty's campaign and republished Campaign materials from the Campaign's website, which reportedly[1] displayed a message about the campaign contributions Senator Toomey received from Wall Street donors and his position on the privatization of Social Security.

While there are some similarities between the reported Campaign Message and the Advertisement, there are also significant differences. The Campaign Message criticizes Senator Toomey for making money on Wall Street, working for a Chinese billionaire investor, and voting on the side of Wall Street and China while in Congress. The Advertisement does not refer to any of those points. In fact, other than the partial thematic similarities between the Campaign message and the Advertisement, the Complaint does not present any evidence that Respondent coordinated with the Campaign on the Advertisement. Nor does the Complaint explain how the Campaign Message informed the content of the Advertisement, when the Campaign Message was posted *after* the Advertisement was already on the air. Contrary to the allegations made in the Complaint, no coordination occurred between the Campaign and Majority Forward. Majority Forward created, produced, and disseminated the Advertisement independently of any candidate, candidate's committee, or any agents of the foregoing.

LEGAL ANALYSIS

A. The Complaint Does Not Allege Facts Establishing that the Advertisement is a Coordinated Communication

A communication is a "coordinated communication" under 11 C.F.R. § 109.21 only if it satisfies the three prongs of the coordination standard, including one or more of the conduct standards set forth in 11 C.F.R. § 109.21(d). Republication of campaign materials under 11 C.F.R. § 109.23 requires the "dissemination, distribution, or republication, in whole or in part, of any . . . written, graphic, or other form of campaign materials . . . ."[2] Because the Complaint fails to provide facts

[1] The Complaint alleges (and a news article upon which the Complaint relies reported) that a certain message was posted on the "notice" section of Ms. McGinty's publicly available campaign website. However, since no messages similar to the one that the Complaint alleges informed the Advertisement appear on the "notices" page, Respondent refers to the message as a "reported" or "alleged" message herein.

[2] 11 C.F.R. § 109.23(a).

showing any request, suggestion, or assent, substantial discussion, or material involvement on the part of the Campaign or its agents in connection with the Advertisement, and fails to show any reproduction of Campaign materials, the Commission should find no "reason to believe" a violation of the Act occurred.

1. The Advertisement did not republish Campaign materials

Republication of campaign materials under 11 C.F.R. § 109.23 requires the "dissemination, distribution, or republication, in whole or in part, of any . . . written, graphic, or other form of campaign materials . . . ."[3] The Complaint alleges that the Advertisement republished Campaign materials in violation of this provision. It did not. Indeed, the Complaint itself acknowledges that the Advertisement was already on the air before the Campaign Message was even posted.[4] The Complaint attempts to blur this critical fact by alleging that the Campaign was "communicating to Majority First [*sic*] to continue running the ad, or Majority First [*sic*] took the language from the campaign."[5] But this fact is fatal to the Complaint's allegations. Practically speaking, it means that Majority Forward had already drafted the script for the Advertisement, produced the Advertisement, shipped the Advertisement to Pennsylvania television stations, and that television stations were already airing the Advertisement *before* the Campaign Message was ever posted. Thus, there is no way that the Campaign Message could have informed the content of the Advertisement, as the Complaint contends.[6] And the notion that the Campaign posted the message to communicate to Majority Forward that it should continue running the Advertisement is based on nothing more than speculation. Indeed, the Complaint does not point to a single fact to support that allegation. The Commission has repeatedly stated that unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.[7] That rule applies here, and the Complaint's allegation of coordination should be dismissed.

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[3] *Id.* § 109.23(a).

[4] Compl. at 3-4.

[5] *Id.* at 7.

[6] Given that the Advertisement was already airing when the Campaign message was posted, it is possible that the content of the Advertisement somehow informed the Campaign Message. But this activity would not constitute coordination under Commission regulations, which provide that coordination is based on a third party acting on information about a *candidate's* plans, projects, activities, or needs, not the other way around. *See* 11 C.F.R. § 109.21.

[7] *See* Statement of Reasons, Commissioners Mason, Sandstrom, Smith, and Thomas, MUR 4960 (Dec. 21, 2001).

Even if the Complaint was not premised on a fact that renders its allegations meritless, it would still fail to set forth facts sufficient to allege that the Advertisement "republished" Campaign materials. The Commission has rejected the idea that incorporating publicly available information into a third party's advertisement amounts to "republication," explaining that overlaps in theme are "not enough to suggest coordination,"[8] and that "[t]he practical reality is that an intelligently planned independent expenditure effort will always employ similar themes and issues, or attack the same weaknesses of the opponent, as the campaign of the beneficiary candidate."[9] Moreover, thematic similarities between a third party advertisement and campaign materials are "reasonably attributed to the common sense conclusion that most parties and candidates will be addressing a defined set of campaign issues in their advertising. The Commission has no legal basis to assign a legal consequence to these similarities without specific evidence of prior coordination."[10] Here, there is no indication of prior coordination, and no inclusion of candidate campaign materials that could trigger the Act's republication provision.

It is no surprise that the Campaign Message and the Advertisement employed similar critiques of Senator Toomey. It is well known that Senator Toomey's acceptance of campaign contributions from Wall Street and his position in favor of privatizing Social Security are among his political liabilities. Notably, when he first ran for Senate in 2010, Senator Toomey was criticized by his opponent, Joe Sestak, in the same way.[11] As the Commission recognized just last year when it dismissed a similar complaint in MUR 6821, the mere fact that the Campaign and Majority Forward are criticizing Senator Toomey for similar issues plainly does not amount to "republication."[12]

2. The conduct prong has not been satisfied

The Complaint also alleges that the Advertisement amounted to a "request or suggestion" on the part of the Campaign that satisfied the conduct prong of the coordination standard. That

[8] MUR 6821, Factual and Legal Analysis (Dec. 2, 2015).

[9] MUR 2766, Statement of Reasons of Commissioner Josefiak at 23.

[10] *See* Statement for the Record, Commissioners David M. Mason, Bradley A. Smith, and Michael E. Toner, MUR 5369 at 5 (Aug. 15, 2003).

[11] *See* Pennsylvania Senate Race Ad Campaigns: Sestak versus Toomey, *available at* https://www.youtube.com/watch?v=mS9x82rOL24 (beginning at 1:12) ("Toomey a top recipient of Wall Street cash," "Toomey: Privatize Social Security").

[12] MUR 6821, Factual and Legal Analysis (Dec. 2, 2015) ("Respondents note that these topics were well-known criticisms of [Scott] Brown during his 2012 Senate campaign in Massachusetts and point to other advertisements with similar themes from that election.").

allegation is wrong as a matter of law. Thus, even if the Campaign Message had been posted prior to the creation of the Advertisement, making it possible that the message informed the content of the ad, the facts alleged in the Complaint would still fail to state a coordination claim under Commission regulations. The Commission's regulations are clear that campaign communications appearing on a publicly available website—such as the Campaign message—are *never* a basis to find that the conduct prong has been satisfied.

In 2003, the Commission published its revised coordination rule. As part of the rule, the Commission established that a "request or suggestion" by a campaign that a third party disseminate a communication on its behalf satisfied the "conduct prong."[13] However, the Commission clarified in its Explanation and Justification that a request or suggestion on a publicly available website could *never* satisfy the "conduct prong." As the Commission explained, "[t]he 'request or suggestion' conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1)."[14]

Three years later, the Commission again clarified that the use of publicly available information by a third party did *not* satisfy the conduct prong. The Commission explained, "[u]nder the new safe harbor, a communication created with information found, for instance, on a candidate's or political party's Web site, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication."[15]

As recently as last year, in MUR 6821, the Commission reiterated that "a communication resulting from a general request to the public or the use of publicly available information, including information displayed on a candidate's campaign website, does not satisfy the conduct standards."[16] Accordingly, the Commission declined to find reason to believe that coordination occurred in MUR 6821 based on the alleged facts that an independent expenditure-only committee sponsored advertisements similar in theme to messages that had been posted on a

[13] 11 C.F.R. 109.21(d)(1).

[14] Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

[15] Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

[16] MUR 6821, Factual and Legal Analysis (Dec. 2, 2015).

candidate's publicly available campaign website and later publicly "tweeted" by a political party committee. This matter compels the same result.

The Complaint fails to allege any facts showing that the Campaign made a "request or suggestion" that Respondent disseminate any advertisements on its behalf. First, as noted above, the alleged "request" was posted on the Campaign website *after* the Advertisement was already airing. This fact alone cripples the Complaint's allegations. To the extent that the Complaint alleges that the posting of the Campaign Message was a request for Majority Forward to continue airing the Advertisement, that allegation is based on pure conjecture. And even if the Complaint had sufficient facts to support that claim, those facts still would not amount to coordination as the Complaint offers no evidence of any communication actually directed at Respondent. Rather, just as in MUR 6821, the alleged "request" was directed to the public at large on the Campaign's website.[17]

The Complaint pays lip service to the other standards of the conduct prong, but it likewise fails to allege that the Campaign was "materially involved in decisions" regarding any specific aspects of the Advertisement or that any "substantial discussion" about the Advertisement occurred. Commission regulations expressly provide that neither of these conduct standards are satisfied "if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source."[18] Thus, the Complaint's argument that the Advertisement meets "several of the conduct prongs under 11 C.F.R. 109.21(d)"[19] contradicts the clear terms of the regulations and must fail.

CONCLUSION

[17] The Complaint insinuates that the Campaign message was not publicly available by stating that the message was placed on a "somewhat public web page." Compl. at 5-6. However, Complainant itself recognizes that the notion that Ms. McGinty's campaign committee's website—www.katiemcginty.com—is not publicly available is meritless. The Complaint also incorrectly contends that the rule that republication cannot occur where campaign communications are made publicly available does not apply to requests or suggestions under 11 C.F.R. § 109.21(d)(1) because that section of the regulation does not explicitly provide for such an exception, and because "[a]ny other interpretation would be contrary to the plain language of the Commission's regulations." Compl. at 6 n. 29. However, this idea is erroneous given that the Commission has explicitly stated that "the request or suggestion standard in paragraph (d)(1) [of 11 C.F.R. § 109.21]" does not cover communications offered to the public generally. Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (emphasis added).

[18] 11 C.F.R. § 109.21(d)(2), (3); *see also* Explanation and Justification, Coordinated Communications, 71 Fed. Reg. 33,194, 33,205 (June 8, 2006) ("a communication created with information found, for instance on a candidate's . . . Web site . . . is not a coordinated communication if that information is subsequently used in connection with a communication.").

[19] Compl. at 4.

The Commission may find "reason to believe" only if a Complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act.[20] Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.[21] The Complaint does not set forth sufficient specific unrebutted facts, which, if proven true, would constitute a violation of the Act. For the reasons set forth herein, the specific facts that it does allege—that Majority Forward sponsored an advertisement similar in theme to a reported message that was posted on the Campaign's publicly available website *after* Majority Forward's advertisement was already on the air—does not constitute a violation of the Act.

Accordingly, the Commission should reject the Complaint's request for an investigation, find no reason to believe that a violation of the Act or Commission regulations has occurred, and immediately dismiss this matter.

Very truly yours,

Marc E. Elias
Ezra W. Reese
Aria C. Branch
Counsel to Respondent

[20] *See* 11. C.F.R. § 109.21(a).

[21] *See* Statement of Reasons, Commissioners Mason, Sandstrom, Smith, and Thomas, MUR 4960 (Dec. 21, 2001).